JUDICIAL CONFLICT. — MISTAKE IN BOUNDARY LINES.

THE subject of the conflict of judicial opinion considered in its general features, apart from a discussion of any particular line of decisions, presents a field of inquiry to the student at once interesting and instructive. Is it the tendency of our modern systems of practice to increase or to lessen the chances that two courts of last resort will decide contrariwise? Do these conflicts recur with such frequency and in such circumstances as to suggest the possibility that perceptible causes are operating to bring them about? In other words, are they capable of being referred to a rule, however much that rule may lie open to exceptions?

To seek to uncover and register with some degree of precision the various influences that are at work shaping the conclusions of the judicial mind, besides the force of legitimate argument addressed to it at the bar, is to enter upon a hopeless task. The acutest judge himself would fail in the attempt. But it is by no means impossible to point out here and there signs of an active influence whose effect may be visibly traced, even if it cannot be reduced to exact terms. These motives, to be sure, are not unworthy, nor are they entertained consciously. Promptings do nevertheless exist that operate with more or less cogency, ranging as they do all the way from a personal bias to those prejudices of race, religion, or locality which an occupant of the bench shares with the community around him. The presence of such factors, subtle as they may be, does not escape the attention of the experienced practitioner. Indeed, a capacity to detect their agency, and aptly to turn them to the advantage of his client, has much to do with a lawyer's success in the trial of causes.

We are inclined to think that it ever remains a mystery to laymen why there should be such frequent diversity of views among judges as to what the law really is.[1] Clients are not altogether satisfied, nor are they much comforted, when, after a case is lost,

[1] A curious instance where a case is twice decided, and decided differently, with no reference in the latter opinion to the former decision, is Elliot *v.* Stone, 12 Cushing, 174, and 1 Gray, 571.

they are told by counsel that the judge who dissented is not only right, but that his opinion is abler and more logical by far than that of the majority of the court. If the law is so plainly on his side, how comes it that most of the judges are blind to the fact? Lawyers are not in the least surprised at all this. They are accustomed to see not only members of a single court divide upon question after question, but also a steady current of diverse opinion maintained from time to time between the courts of different States, as well as between appellate tribunals, State and Federal.[1]

Of course, for the most part these differences yield readily to explanation. In fact, it is easy to summarize the various subjects in respect to which a conflict of views may ordinarily be looked for. Courts, for example, naturally may differ in their conception of what "public policy" requires. They may fail to agree in laying down the extent to which a doctrine of recognized soundness and utility should be carried. So, too, the disposition of the individual judge, in suits involving a political question, is expected to lead him in a direction that favors the party with which he has been identified. We see courts of adjoining States at times diverging widely in their opinion as to the measure of an obligation, in circumstances of fact precisely identical.[2]

---

[1] But see the remark of Lord Mansfield in Millar *v.* Taylor, 4 Burrows, 2395, that this was the first instance of a final difference of opinion in the court since he had sat there. He had sat twenty-three years. "Every order, rule, judgment, and opinion *has hitherto* been *unanimous*," said that great judge. "That unanimity never could have happened if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons." In some sense Mansfield, unconsciously enough, was thus paying tribute to his own great power of convincing the minds of other men.

[2] A comparison of two opinions may sometimes afford the reader almost as much amusement as instruction. With the rapid growth in the building of railroads and manufacturing came the need of issuing corporation bonds. The question early arose as to what kind of a purported seal on a bond was sufficient to render it technically an instrument under seal. In Maine a company had printed a fac-simile of their seal in red on the face of the bond. The Supreme Court of that State pronounced it a legal seal: "The instruments under consideration bear upon their face the imprint in red ink of what purports to be a corporate seal. Here there is a substance affixed to the instrument more tenacious than wax or wafer, adopted and declared by the company to be their seal, and we know of no decision in this enlightened age which declares it to be otherwise." Woodman *v.* York & Cunberland R. R. Co, 50 Me. 543. The case was decided in 1861, the report of it published in 1865. If the reader will turn to Bates *v.* Railroad, 10 Allen, 252, decided in 1865, he will find a decision point blank the other way. In a later case, Hendee *v.* Pinkerton, 14 Allen, 387, Foster, J. says of it: "A fac-simile of the seal of a corporation printed with ink on the blank form of an

A chief justice of marked intellectual ability may leave an impress for years upon the decisions of his court, even to the extent of peculiar views of his own that are shared by scarcely one of his brethren in other jurisdictions. There would seem to be no great difficulty, therefore, in accounting for the cause in a certain proportion of rulings where a difference of opinion displays itself in courts of different States. One community may be agricultural, another commercial, a third largely engaged in manufactures. In one State it happens that capital has accumulated, and the creditor class exercise power in shaping legislation; or they hold, not indeed unfairly, but by the mere fact of their presence, somewhat of the sympathies of the court. In another region most people are borrowers, and judges no less than juries become accustomed to look at a loan of money from the standpoint of the debtor. It does make a difference in the event of a trial whether it be held in a locality where institutions have been long established and conservative habits prevail, or in a new country, where the people are mostly young and active, are impatient of form, and quick to adopt new methods are full of modern ideas of progress. A practising lawyer imbibes freely of the sentiment that prevails among his neighbors. In fact, he has had a full share in its creation. No great wonder is it, then, that, when raised to the bench, the man himself is seen to have undergone little change in his habits of thought and modes of reasoning. The "personal equation," so to speak, in the daily routine of the court, forms an interesting and not unprofitable subject of study.

There are secrets of the consultation room. They should be inviolably kept. All that suitors are entitled to is an announcement of the conclusion that has been reached, unless by the positive terms of the statute judges are required to file written opinions. In those jurisdictions where the statute goes on to prohibit the filing of a dissenting opinion, it is likely for that reason that fewer dissents occur. Were it permitted to enjoy a tolerably full knowledge of the methods by which decisions are arrived at, and

---

obligation at the same time when the blank was printed, and by the same agency, has been recently, in full consideration, decided to be a mere scroll, and not a valid seal."

One finds himself in hearty accord with Mr. Justice Grier, who, to the objection that the seal of a Circuit Court authenticating an acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance," remarks, "It is time that such objection to the validity of seals should cease." Pillow *v.* Roberts (1851), 13 Howard, 474.

opinions given their final shape, we should doubtless be put into possession of material of no small value to those of us who are engaged in the trial of causes. Individual dissent forms a subject by itself.[1] But, from its nature, it is not for outsiders to be favored with much more than an occasional glimpse of what is happening after the learned justices retire to consult together.

The foregoing remarks, it must be confessed, have taken a range wider than is warranted by the topic which we had designed briefly to touch upon. We were about to say a word upon confusion of boundaries. It was our purpose to express a regret that divergence of opinion should exist upon a question so apparently simple as that of the occupancy of land between adjoining owners, for a period of time longer than the statutory limit, where it turns out that the division fence has all the while been standing beyond the true line of boundary. The ordinary business man would take it for granted that the law upon such a point as this had been settled long ago with unanimity throughout the United States. He would be surprised at being told that on a state of facts so frequently recurring as this, the courts of two States geographically near and alike in many respects, namely, Maine and Connecticut, are widely at variance.

To make this plain let it be stated in concrete form.

A. and B. have been adjoining neighbors in a town for more than twenty years. During all this time a substantial fence has stood between their lots, not as the result of an agreement that the line of the fence shall be treated as the line of boundary, but simply because each supposed that the fence as originally put there did as a matter of fact stand on the boundary line. A. has occupied a strip of land three feet, we will say, in width, as a part of his own premises. As a matter of fact it had belonged to B., the fence being three feet over on the other's land.

In Maine it must appear that A. had the purpose of holding this land as his own in any event. That is to say, the courts of Maine permit B. to ascertain from A. whether A. did not keep this strip of land through ignorance, inadvertence, or mistake, believing it to be the true line, but with no intention to claim title to that extent,

[1] A judge dissenting from the doctrine of his own opinion, and saying upon rehearing, "that he now believed that that opinion was wrong," although all the rest of the court adhere to it, is not an every-day spectacle. But see Marshall *v.* United States, 131 U. S. 391.

after it shall have been ascertained that the fence was on his neighbor's land. If A.'s conscience does not permit him to deny the fact that his intent really was to claim the strip only on the condition that the fence was on the true line, the Maine courts declare that his possession is not adverse to B.

This view of what constitutes adverse possession in such circumstances was early combated by the Supreme Court of Connecticut in an admirable opinion by Chief Justice Hosmer.[1] The court in Maine plants itself upon a principle that disseisin cannot be effected by possession taken by mistake.[2] At least this broad statement seems to be justified by an early decision, though the doctrine is now qualified to the extent of stating that possession by mistake may or may not work a disseisin according to circumstances.[3]

Chief Justice Hosmer argues most convincingly that it is "the visible and adverse possession with the intention to possess that constitutes the adverse character, and not the remote views or belief of the possessor."

The doctrine thus disclaimed has recently come up for re-examination in the State of its origin.[4] The opinion by Whitehouse, J., maintains with much force the correctness of the views above indicated of the intention of the adverse holder. It is well worth reading for the ingenuity with which the learned judge meets the objection that the soundness of this position has been questioned in other jurisdictions.

No one denies that the *quo animo* with which land is held is an essential element in adverse possession. It is equally agreed that each party has the intention of occupying and using the land up to the fence as his own. The difficulty arises, it would seem, from attaching a meaning to the term "hostile intention" that may not properly belong to it. The rule of adverse possession takes its origin, we may believe, from the familiar instance of a stranger entering upon the land of another. The intruder, we mean, occupies the land of one to whom he is in reality a stranger. The parties are not neighbors. Occupancy by a stranger, from the very nature of the case, is adverse and hostile in character. It can have but one meaning. The relation, however, of two adjoining owners of land, who live as neighbors to each other, is somewhat different. In most instances propinquity tends to create and keep alive kindly

[1] French *v.* Pearce, 8 Conn. 439.
[2] Ross *v.* Gould, 5 Greenleaf, 204.
[3] Preble *v.* Railroad Co., 85 Maine, 260.
[4] *Ibid*, Emery, J. not concurring.

feelings. The word "neighborly" springs from this creditable disposition in human nature. One sees, therefore, that A. and B., living for years next each other, being more or less intimate, each depending on the other for society and possibly for aid in time of trouble, are likely to retain friendly relations. Let the occasion arise for discovering that one has been occupying for twenty years a strip of land belonging to the other. This land he has all along supposed was his own, and he always meant to hold it as such. To such a man the word "hostile" has a meaning which he would shrink from attaching to the purpose of which he is conscious in occupying the land in question.

The law looks to the visible outward act. The intention to occupy as his own is undisputed. Occupancy for twenty years brings his case within the general rule, unless, indeed, to use the language of Chief Justice Hosmer, "the invisible motives of the mind are to be explored." An objection to inquiring into hidden motives, and searching the conscience for the moral element involved in the act of possession, lies in the very fact that it assumes to deal with a man's motives. It works unjustly, — is not capable of being applied so as even approximately to deal out a measure of justice to everybody. Besides, it violates the principle upon which the doctrine of adverse possession rests; namely, that possession for a long period presumes the existence of a legal right. This principle harmonizes with what is called "a statute of repose." It is for the interest of the public that lapse of time should create, if not a positive right, at least the privilege of not being disturbed. To sustain a rule founded upon this wise provision there must be some absolute standard of what constitutes an adverse possession. Fencing in land, and occupying it for a long period under a claim that it is his own, would seem reasonably to satisfy the conditions of such a standard.

There is much good sense in what the court in Connecticut, speaking through its chief justice, says: "The person who enters on land believing and claiming it to be his own does thus enter and possess (i. e. adversely). The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not that the possessor was mistaken, and had he been better informed would not have entered on the land. This bears on another subject, the moral nature of the action; but it does not point to the inquiry of adverse possession. Of what consequence is it to the person disseised that the disseisor is an honest man?

His property is held by another under a claim of right; and he is subjected to the same privation as if the entry were made with full knowledge of its being unjustifiable."[1]

The Maine court, however, announces an entirely different doctrine as to the effect of a long occupancy of land where the fence has not stood on the true boundary. It says: "In case of occupancy by mistake beyond a line capable of being ascertained, this intention to claim title to the extent of the occupancy must appear to be absolute, and not conditional, otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall be eventually found to be the correct one or not." Per Whitehouse, J.[2]

The position thus taken and maintained by the learned court of Maine appears to have commended itself elsewhere only in a few jurisdictions, notably in Iowa and in Kansas. We entertain a belief that the time shall come when it will be abandoned, as not consistent with the doctrine of adverse possession as heretofore generally understood and acted upon.

Frank W. Hackett.

---

[1] 8 Conn. 445.

[2] 85 Maine, 265.